

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 18, 2008

COREY JOHNSON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 79292 Mary Beth Leibowitz, Judge

No. E2008-01157-CCA-R3-PC - Filed February 4, 2009

The Petitioner, Corey Johnson, pled guilty to second degree murder and entered a guilty plea to attempted first degree murder. In accordance with the plea agreement, the trial court sentenced him to twenty years and fifteen years, respectively, and ordered that the sentences run consecutively, for an effective sentence of thirty-five years. The Petitioner filed a petition for post-conviction relief alleging that he received the ineffective assistance of counsel. The Petitioner alleges that his guilty pleas were entered based on his attorney's assurances to him that the Petitioner would receive an effective sentence of twenty years. The post-conviction court dismissed the petition after a hearing, and we affirm that judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the Appellant, Corey Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; Randall E. Nichols, District Attorney General; Leslie Nassios, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Guilty Plea Hearing

During the hearing in which the Petitioner entered his guilty plea, the State informed the trial court that the Petitioner would be entering a plea of guilty to second degree murder, with a recommended punishment of twenty years. He would also be pleading guilty, the State said, to attempted first degree murder, with a recommended punishment of fifteen years. The State

informed the court that multiple other charges against the Petitioner would be dismissed in exchange for the plea. The State informed the court, “[T]he bottom line on all of this is that there would be a 35 – a total effective sentence of 35 years, and that everything else would be resolved.”

The trial court asked the Petitioner whether he understood the Attorney General’s statement of the agreement. The Petitioner responded affirmatively. The trial court then went through the terms of the agreement with the Petitioner, who indicated that he understood each of those terms. The Petitioner told the trial court that he was “pleading guilty in my best interest.” The State told the court that the parties specifically agreed that this was not a best interest, or *Alford*,¹ plea. The trial court then asked the parties to come back for a trial on the two charges on the following Monday. The Petitioner’s attorney stated, “Your Honor, I believe he’s – and you can inquire as to him. He’s indicating he is pleading guilty. He’s admitting his guilt. He just feels it’s in his best interest to do so. And if you want to inquire further, that’s up to you.” The parties then clarified that a best interest plea was one in which the defendant did not admit guilt but that the Petitioner in this case admitted guilt. The trial court asked the Petitioner, “You—then, in effect, you admit you are guilty. Is that correct?” The Petitioner responded affirmatively. The trial court subsequently accepted the Petitioner’s guilty plea.

The State informed the trial court that had the case gone to trial the evidence would have proven that:

[A]bout 2:45 in the afternoon of November the 4th of 1995, Keithy (phonetic) Smith, who was a resident of Knox County, living at an address on Ivy Street here in Knoxville, Tennessee, called the Knoxville Police Department to report that there had been a shooting outside of his house.

. . . [T]he Police Department went to Mr. Smith’s home and talked to him. There was no evidence anywhere that anything had happened at that point.

Mr. Smith reported to the police that his nephew, the codefendant in this matter, Jimmy Andre Smith, had been at his house. He had paged someone to come. That another individual that he knew only as Black had been across the street somewhere when the – a Nissan Pathfinder pulled up in front of Mr. Smith’s house. His nephew, Mr. Smith, went out to the vehicle, and Black came out also to the vehicle. Jimmy Andre Smith got into the vehicle. And Keithy Smith, who was observing all this from his yard as he was working on his wife’s car, heard a gunshot from inside the vehicle, and an individual fell out of the vehicle into the street.

¹*North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

At that point in time, Jimmy Andre Smith and Black came around—and one had what appeared to be a revolver; the other had what appeared to be an automatic pistol—started firing into the individual who was lying on the street.

Mr. Keithy Smith would testify that the individual on the street put his hands up in defense. Several shots were fired.

When the shooting stopped, the individual was placed back into the Pathfinder, and Jimmy Andre Smith got behind the wheel and drove it away. And that's why there was no evidence at this location that anything had happened.

The Nissan Pathfinder was found a short distance away. It had blood on the seats and identification in the vehicle indicating that it belonged to the victim, Michael Moore.

The next morning, about eleven o'clock in the morning, Knoxville Fire Department members found a body that was later identified as being that of Michael Moore. It had been discovered down an embankment.

An autopsy report showed there were multiple gunshot wounds that had been the cause of death. Bullets were retrieved from the body.

And on November the 6th, there was a call to the Knoxville Police Department from an Erica Johnson, who reported that Jimmy Andre Smith and an individual named Black had come to her apartment and left two handguns there.

Those handguns were retrieved. The bullets and these two handguns were sent off to the TBI Crime Lab, and the bullets from Mr. Moore's body were matched to being fired from these two handguns.

It was later identified – along with Jimmy Andrew Smith, the other individual known as Black was identified as Corey Johnson, who also went by the name of Corey Black.

And all these events did occur in Knox County, Tennessee.

After Mr. Keithy Smith was identified as a witness in that case, he started having problems, harassment and other problems around his house.

He and his two stepsons were out in front of their house on June the 24th of 1999, working on a car again. A vehicle pulled up, and several gunshots were fired. Keithy Smith ran towards the house. He was struck four times, four different bullets, and several other bullets hit in other locations around the house. Hit the house, hit the ground around Mr. Smith.

Corey Johnson was identified as being the person who had fired these shots.

And all these events did occur in Knox County, Tennessee.

The trial court accepted the Petitioner's plea of guilty to second degree murder and attempted first degree murder and ordered the agreed sentences. It stated, "This [fifteen year sentence] shall be served consecutively to the [twenty year] sentence"

B. Post-Conviction Hearing

The Petitioner filed a petition for post-conviction relief in which he alleged that his guilty plea was not knowingly and voluntarily entered because he received the ineffective assistance of counsel. At a hearing on the petition, the Petitioner testified that he left school after completing the sixth grade. He said that he cannot read and has trouble writing. The Petitioner said that eight years elapsed between the time he was charged with first degree murder and the time that he pled guilty. During that time, he was represented by four attorneys before Counsel represented him. The Petitioner did not "get along" with his first two attorneys and asked that they be removed from his case. His third attorney represented him for three to four years but was relieved after they had a disagreement. Counsel represented him for about four months before he pled guilty.

The Petitioner testified that, during the four months that Counsel represented him, they met approximately six or seven times. During those meetings, the Petitioner told Counsel that he did not "set out" to harm Moore (the victim in the first degree murder case). The Petitioner testified he gave Counsel the following account of the shooting: He was sitting in the yard when Moore pulled up. The Petitioner's co-defendant, Jimmy, came out of the house and got into the car with Moore. The two began to argue, and the Petitioner heard some shooting. When he heard the shooting, he saw that the two men were fighting in the car. The Petitioner got a gun out of Keithy Smith's car and approached Moore's car. As he approached, Moore quickly got out of the car, so the Petitioner shot Moore through the window. The Petitioner testified he told Counsel that he shot Moore in defense of his co-defendant. The Petitioner said that he was defending himself also because he thought Moore was going to shoot him due to the way Moore jumped out of the car.

The Petitioner further testified that he told Counsel that he did not shoot Smith at all. Counsel told the Petitioner that none of the witnesses who planned to testify against him would talk to Counsel's investigator.

The Petitioner testified that Counsel informed him that he would be sentenced to twenty years for shooting and killing Moore and fifteen years for shooting Smith. The Petitioner maintained that Counsel told him that his sentences were going to run "together," meaning that the fifteen-year sentence would merge with the twenty-year sentence. The Petitioner said that he learned that he would be serving a thirty-five-year sentence only after he started serving his

sentence. He wrote Counsel a letter asking him to withdraw his guilty plea, but he did not receive a response.

The Petitioner insisted that he intended to enter a best interest plea for the attempted first degree murder of Smith because he did not want to admit guilt. He said that, although he did not shoot Smith, he agreed to plead guilty because his sentence for that conviction was to run concurrently with his other sentence and that, therefore, "it didn't matter."

The Petitioner said that the trial judge appointed a doctor to examine the Petitioner before he entered his guilty plea. Counsel told him that the results showed he needed further evaluation and medication. The Petitioner said, however, that no further mental evaluations were ever performed.

The Petitioner said he would have insisted on going to trial on both cases had he known that he was going to receive a thirty-five year sentence.

On cross-examination, the Petitioner agreed he made bond after being charged with killing Moore. During the time the Petitioner was released, Smith was shot, and the Petitioner was charged with Smith's shooting. The State questioned the Petitioner about all of the attorneys that had been appointed to represent him and all of the motions filed on his behalf. After being reminded, the Petitioner agreed that Counsel had represented him for almost a year before his guilty plea hearing, instead of for only four months, as he previously had testified.

The Petitioner agreed that the transcript from his guilty plea hearing showed that the prosecutor informed the trial court that the Petitioner would be pleading guilty to a lesser-included offense of first degree murder. He said he understood that he was facing life in prison for the first degree murder charge, but, if he pled guilty to second degree murder he would be sentenced to a term between fifteen and sixty years. He understood that he was going to serve the twenty year sentence at 100%. He also agreed that the prosecutor told the court that the fifteen-year sentence would run consecutively to the twenty year sentence. The Petitioner agreed that the State dismissed multiple misdemeanors and felonies as part of the plea agreement. The Petitioner further acknowledged that the transcript showed that the prosecutor informed the trial judge that the Petitioner would receive a total effective sentence of thirty-five years. The Petitioner agreed that the trial court informed the Petitioner about the fifteen-year sentence when it said, "[Y]ou would receive a 15 year sentence as a Range I standard offender. That is a 30% sentence to be served after the 20 year sentence."

About the best interest plea, the Petitioner agreed that the transcript showed that, after the discussion about a best interest plea, the Petitioner admitted to the trial court that he was guilty of the charged offenses. The Petitioner conceded that the trial court gave him the opportunity to plead not guilty, but the Petitioner told the trial judge that he wanted to plead guilty and resolve his charges. The Petitioner agreed that the transcript showed that he apologized for committing these offenses and said that he wanted to take responsibility for his actions. The Petitioner agreed the trial court informed him he would receive a total sentence of thirty-five years, and the

Petitioner told the judge he understood his sentence. On redirect examination, the Petitioner said, if Counsel had been ready to go to trial, the Petitioner would have gone to trial on both charges.

Counsel testified that multiple attorneys before Counsel had represented the Petitioner. Counsel said he represented the Petitioner for approximately one year before the Petitioner pled guilty, during which time the Petitioner was incarcerated. Counsel recalled that the Petitioner was emphatic that he was not guilty of first degree murder. He said the two had multiple discussions about what constituted first degree and second degree murder. Counsel said that he did not recall the Petitioner saying he was absolutely innocent of shooting Smith and that he would not have allowed the Petitioner to plead guilty if the Petitioner had maintained his absolute innocence. Counsel testified that he was “sure” he interviewed the witnesses in the first degree murder case. He “vaguely” recalled interviewing Smith, but he remembered that Smith was adamant that the Petitioner shot him.

Counsel testified that he unsuccessfully tried to get the State to agree to a “best interest plea” because the Petitioner did not want to go to trial and risk being convicted of first degree murder. Counsel said that he felt that the Petitioner understood the charges to which he was pleading guilty and the sentences he would receive for those convictions.

Counsel testified he went through the Petitioner’s sentence with him in detail. He also wrote “total effective sentence” in the plea agreement in order to clearly establish that the Petitioner would receive a thirty-five year sentence.

Based upon this testimony and the record, the post-conviction court dismissed the Petitioner’s petition.

II. Analysis

On appeal, the Petitioner contends that he received the ineffective assistance of Counsel, which resulted in his guilty plea being unknowingly and involuntarily entered. He asserts that Counsel was ineffective because Counsel told him that his sentences would run concurrently, for a total effective sentence of twenty years and that he was entering a “best interest” plea. The Petitioner asserts that both of these statements were untrue, which made the Petitioner’s guilty plea not knowingly and voluntarily entered. The State responds that the record shows that the Petitioner was informed that his total sentence would be thirty-five years and that he understood the terms of his plea agreement. Further, it contends that no proof supports the Petitioner’s claim other than his “bare assertion that he misunderstood the terms of the plea agreement”

When it denied the petition for post-conviction relief, the post-conviction court found:

From the transcript of the evidence it is clear that the court carefully went through the plea agreement with [the Petitioner] and he understood the admission of guilty, did admit to the guilt, and freely waived his rights and accepted the plea.

[The Petitioner] cannot show that his outcome would have been better in light of the fact that he entered a plea in case number 61913 to second degree murder for which he received twenty (20) years and to a minimum amount as a Range I, Standard Offender for fifteen (15) years to be served consecutively by law in light of the fact that he was on bond to the first degree murder in case number 68674. [The Petitioner] had originally been charged with first degree murder and attempted first degree murder resulting in much more extensive potential sentence, and many other cases that were nolle prossed as a result of the agreement. [The Petitioner] has not demonstrated that [Counsel], or his other attorneys, have failed in any way to comply with the strictures of Baxter v. Rose and Strickland v. Washington or their Tennessee progeny nor can he show that the outcome in this situation would have been any different in the event that [the Petitioner] had gone to trial.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can only be overcome when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney’s performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney’s perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, but only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, “in considering claims of ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that “[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See *State v. Turner*, 919 S.W.2d 346,

353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). The circumstances include:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing *Caudill v. Jago*, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not “voluntary.” *Id.*

We conclude that the evidence does not preponderate against the post-conviction court’s finding that the Petitioner’s guilty plea was knowing and voluntary. As the post-conviction court found, the record shows that the Petitioner understood that he was admitting guilt to both offenses. The Petitioner admitted that he was guilty of the crimes to which he was pleading guilty. Further, the record demonstrates that the Petitioner was informed on multiple occasions that his effective sentence would be thirty-five years. Although the Petitioner asserts that Counsel privately told him otherwise, the trial judge repeatedly asked the Petitioner whether he had any questions, informed the Petitioner that his sentence would be thirty-five years, and asked the Petitioner if he understood his sentence. The Petitioner has not met his burden of proving that his plea was a result of ignorance or misunderstanding or that Counsel’s representation was deficient in any regard. He is, therefore, not entitled to post-conviction relief, and we affirm the post-conviction court’s dismissal of his petition.

III. Conclusion

After a thorough review of the record and applicable law, we conclude the Petitioner has failed to demonstrate that the post-conviction court erred when it denied his petition for post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER